BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF REDMOOR CORPORATION, Appellant, v. PUGET SOUND AIR POLLUTION CONTROL AGENCY, Respondent.	PCHB No. 85-230 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THIS MATTER, the appeal of a Notice and Order of Civil Penalty of $1,000 for the emission of troublesome smoke from four land clearing fires at a site in south Snohomish County one day in June of 1985, came on for hearing before the Board on the tenth of March, 1986. Seated for and as the Board were Lawrence J. Faulk, Wick Dufford, and Gayle Rothrock (presiding). Respondent agency elected a formal hearing in accordance with WAC 371-08-155. Lisa Flechtner of Barker and Associates officially reported the proceedings.

Respondent appeared and was represented by its attorney, Keith D.

McGoffin. Appellant appeared and was represented by Lee Downie, its General Manager.

Witnesses were sworn and testified. Exhibits were admitted and examined. Argument was heard. From the testimony, evidence, and contentions of the parties, the Board makes these

FINDINGS OF FACT

I

Respondent PSAPCA has filed with the Board a certified copy of its Regulation I, and all amendments thereto, of which we take official notice.

II

In June, 1985, Redmoor Corporation, a land clearing and site preparation firm, was a subcontractor to Deal Enterprises, a general contractor working on the development of a parcel of land owned in part by the Edmonds School District No. 15 and in part by Planned Parenthood of Washington State. The parcel is located in south Snohomish County in the area of 36th West and 180th-184th S.W..

III

PSAPCA is an activated air pollution control authority empowered to monitor and regulate sources producing emissions and air contaminants in a five-county area in mid-Puget Sound.

IV

Redmoor applied for and received on June 13, 1985, a Population Density Verification (PDV) from PSAPCA assuring it would be operating in an area whose population was not as dense as 2,500

persons per square mile. Deal Enterprises was listed as the owner of the property. The verification, in Condition 3, cautioned that odor, smoke, and flyash must not be emitted in such a fashion as to interfere unreasonably with others' enjoyment of life and property. This condition replicates PSAPCA Regulation I, Section 9.11(A).

V

In mid-June of 1985, Redmoor Corp. and Deal Enterprises commenced land clearing and site preparation. Fires were ignited and debris was burned for nearly a week.

On June eighteenth, in the late morning, complaints came into PSAPCA from apartment-dwelling neighbors southeast of the site regarding smoke and odor irritation from land clearing fires. A PSAPCA inspector visited the apartment complex and found the buildings enveloped in smoke. His eyes were stinging and watering from the smoke and he experienced an obnoxious smoke odor--one strong enough to cause attempts at avoidance. He observed that significant amounts of soot had fallen out on the apartment complex property. Three residents of the apartment visited with the inspector about their complaints over the effects of the fires.

VI

On June eighteenth, the complaining residents experienced difficulty breathing, watering and burning of the eyes, sneezing and coughing. Soot came through windows and covered furniture. It fell out into the swimming pool and onto parked cars. The day was hot, sunny and dry, but windows at the apartments had to been kept closed

to keep out the smoke.

VII

Several days earlier the PSAPCA inspector in response to a previous complaint had approached what appeared to be responsible persons on the burn site to indicate the lack of acceptability of heavy smoke and other emissions coming from the land clearing fires. The persons contacted were employees of Deal Enterprises. No one from Deal, however, communicated about this to the Redmoor's field superintendent.

VIII

On June eighteenth, PSAPCA's inspector found four land clearing fires being burned, in an elevated area near the center of the 16 acre land clearing site. The location had been selected to try to minimize the possibility of smoke problems off-site. Additionally fans were in use to make the fires burn as hot as possible in order to reduce smoke.

The wind was shifting erractically from the northwest to the west and blowing about 5 mph. The inspector took four photos of the burning but did not encounter anyone on the site. Redmoor's field supervisor was unaware that the inspector had visited the job.

IX

The inspector left the site and telephoned Kip Deal at Deal Enterprises, Inc. and advised of the emissions problems. This information was not immediately relayed to Redmoor. No one from Redmoor was contacted until that evening. Response to the problem was, thus, delayed.

X

During his phone call to Deal, the PSAPCA inspector learned that Deal Enterprises held a leasehold interest in the property and had for some years. Deal was apparently trying to buy the property from Edmonds School District No. 15 and Planned Parenthood.

Puzzled about the exact nature of ownership and property responsibility, the inspector took no chances and issued three notices of violation[1/] to the four entities on June 20, 1985.

XI

The Enforcement Office of PSAPCA evaluated the notices and recommended to the director of the agency the issuance of a notice and order of civil penalty assessing a $1,000 fine. Such an order (No. 6335) was issued on the 29th of October, 1985, addressed to Redmmor Corporation, Deal Enterprises and Edmonds School District No. 15.

XII

Redmoor routinely engages in land clearing projects and is well aware of PSAPCA's regulations. The company has no prior adjudicated open burning violations.

The population density at the site was apparently near the margin, beyond which burning is not usually allowed. The Redmoor field superintendent stated that the company had been prepared to haul off the debris had they not received a PDV.

1/ Each formal complaint led to a Notice of Violation. Only one civil penalty resulted from all of this.

XIII

Neither Deal Enterprises nor the Edmonds School District No. 15 appealed the civil penalty. The evidence adduced at hearing proved that the School District had no involvement in the open burning which was conducted. No prior violations of air pollution regulations by Deal Enterprises was shown.

XIV

The Redmoor Corporation, feeling aggrieved at being named included in a civil penalty when a PDV had been issued, appealed to the Board for relief from penalty on November 18, 1985. The matter became our cause number PCHB 85-230.

From these Findings the Board comes to these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over these persons and these matters. Chapters 70.94 and 43.21B RCW.

II

Outdoor fires to dispose of land clearing debris did occur on the subject property and, on June 18, 1985, did emit smoke and soot in sufficient quantities and of such characteristics and duration that it came over onto a neighboring apartment house property and unreasonably interfered with enjoyment of life and property.

III

The Legislature of the state of Washington has enacted the following policy on outdoor fires:

> It is the policy of the state to achieve and maintain high levels of air quality and to this end to minimize to the greatest extent reasonably possible the burning of outdoor fires. Consistent with this policy, the legislature declares that such fires should be allowed only a limited basis under strict regulation and close control. RCW 70.94.740.

IV

The open burning program of PSAPCA allows land clearing burning without a permit in areas where the average population density on land within 0.6 miles of the proposed burning site is 2500 persons per square mile or less. PSAPCA Regulation I, Sections 8.05, 8.06(3). The PDV issued by the agency verified that the population around the site here was sufficiently sparse for such burning to occur.

However, even where allowed, landing clearing burning is subject to the general restriction of Section 9.11(a) which makes it unlawful for any person

> to cause or permit the emission of an air contaminant in sufficient quantities and of such characterisitcis and duration as is, or is likely to be, injurious to human health, plant or animal life, or property, or which unreasonably interferes with enjoyment of life and property.

This language parallels the statutory definition of "air pollution," RCW 70.94.030(2), and is, in effect, a restatement of the Clean Air Act's prohibition of acts which cause or permit "air pollution." RCW 70.94.040.

The PDV on its face states that land clearing burning must not violate this limitation on injurious effects.

V

Deal Enterprises and Redmoor Corporation allowed outdoor fires to occur and be perpetuated in a manner which violated the regulations and the statute law and they are liable for a penalty for the events of June 18, 1985.

VI

The Clean Air Act is a strict liability statute. Explanations do not operate to excuse violations. Explanatory matters are, however, relevant to the question of how much the penalty should be for any particular violation.

The purpose of the civil penalty is not retribution but rather to influence the behavior of the perpetrator and to deter violations generally. Determining the proper amount in any case involves consideration of factors bearing on reasonableness in light of the penalty's purpose. These factors include:

a.) The nature of the violation;

b.) The prior behavior of the violator;

c.) Actions taken after the violation to solve the problem.

Puget Chemco v. PSAPCA, PCHB No. 84-245(1985).

VII

Here the maximum statutory amount ($1000) was assessed. RCW 70.94.431(1).

The violation was a serious one. It involved more than exceeding a technology - based emission standard. Actual adverse consequences

were inflicted on both people and property.

However, neither Deal Enterprises nor Redmoor Corporation have a prior history of violating open burning regulations. Though the problem at issue was not corrected immediately, this was apparently due to only communication failures. Neither entity has committed a violation since June, 1985.

The event appears simply an isolated case of misjudgment - burning in an area near an apartment complex under the wrong meterological conditions.

VIII

We conclude that the presumption of responsibility by the Edmonds School District as owner was rebutted. See Regulation I, Section 8.04(b). Under the evidence before us both Deal Enterprises and Redmoor Corporation had a duty imposed by statute not to cause or permit "air pollution." Deal could not delegate this duty to a subcontractor. See Sea Farms v. Foster & Marshall, 42 Wn.App. 308, _____ P.2d_____(1985). Thus, Deal and Redmoor are jointly and severally liable. In this situation it is not for us to apportion the penalty as between them. They must resolve that matter between themselves or by such other remedies as are available.

Looking at the entire array of facts and circumstances, the order set forth below is appropriate.

IX

Any Finding of Fact hereinafter determined to be a Conclusion of Law is hereby adopted as such.

From these Conclusions, the Board makes this

ORDER

Notice and Order of Civil Penalty No. 6335 is reversed as to Edmonds School District No. 15. It is affirmed as to Deal Enterprises and Redmoor Corporation in the amount of $500; $500 of the penalty is vacated.

DONE this 25th day of March, 1986.

POLLUTION CONTROL HEARINGS BOARD

Gayle Rothrock

GAYLE ROTHROCK, Vice Chairman

3/25/86

LAWRENCE J. FAULK, Chairman

WICK DUFFORD, Lawyer Member